ARTICLE SEP 26, 2018

Ensuring the Special Counsel's Independence if Rosenstein Is Fired

Robert Mueller must be assured independence from partisan interference by the Trump administration.

AUTHORS

Ben Olinsky

Sam Berger

Restoring Social Trust in Democracy, Democracy, Trump Administration

Robert Mueller testifies before a Senate Judiciary Committee, June 2018. (Getty/Tom Williams)

President Donald Trump has repeatedly threatened to take drastic action to undermine special counsel Robert Mueller's investigation into the Trump campaign and Russian interference in the 2016 election. His latest target is Deputy Attorney General Rod Rosenstein, who oversees Mueller.

If Trump seeks to undermine the investigation and obstruct justice by firing Rosenstein, there would be serious concerns about the impartiality of any political official at the U.S. Department of Justice who replaces him. These concerns are heightened by Trump's repeated demands that the Department of Justice protect him from accountability for his actions. The only way to repair the trust of the American people in the integrity of the investigation would be to follow past precedent and ensure the special counsel is truly independent.

Just as the Nixon administration did, the acting attorney general for purposes of Mueller's investigation must enter into a written delegation agreement that provides full authority to the special counsel, including the following key commitments that the acting attorney general will not interfere with the investigation:

- **Removal:** The special counsel cannot be removed except for "extraordinary improprieties" on his part and will continue his work until satisfied that he has completed his mandate.
- **Independence and noninterference:** Political appointees at the Department of Justice will not countermand or interfere with the special counsel's decisions or actions, and he will determine whether and to what extent to inform or consult with the acting attorney general.

- **Access to information and resources:** The special counsel will be able to maintain a team of his choosing and continue to be granted full access to information and resources from the FBI, the Department of Justice, and other federal agencies.

- **Scope:** The special counsel will have the mandate of investigating any violations of the law related to Russian interference in our elections; any related matter that may present itself upon following the evidence; and any collateral matters (such as obstruction of justice, perjury, etc.). The scope of the special counsel's investigation shall include any additional matters the special counsel has been approved to investigate since his appointment.

- **Transparency:** The special counsel will be free to make information public at his sole discretion and at a time and place of his choosing while protecting classified information and information covered by grand jury secrecy requirements. The special counsel shall provide unmediated reports to Congress at his discretion and at a time of his choosing and immediately notify bipartisan committee leadership should the administration prevent him from making public relevant information of a classified nature.

Without these steps, the acting attorney general overseeing the investigation could hamstring Mueller's work, and such interference may constitute obstruction. He could limit the scope of the investigation, veto critical investigative or prosecutorial steps, limit access to staff and resources, and decline to release Mueller's reports.

Requiring this type of written document to ensure independence is consistent with past precedent. When the Nixon administration's Acting Attorney General Robert Bork appointed lawyer Leon Jaworski as special prosecutor to oversee the criminal investigation into Watergate—after Nixon's infamous decision to fire the previous special prosecutor—he agreed to give the prosecutor the same significant independence the previous special prosecutor had. This included the ability to assemble his own staff, to continue until he felt he completed his mandate, and to make public statements that he deemed appropriate. Perhaps most significantly, Bork agreed to the following written language:

> **The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. ... The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part ...** (**38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805**)

A similar grant of authority to ensure true independence on the part of the special counsel is necessary in light of the president's continued attack on the rule of law.

Ben Olinsky is senior vice president for Policy and Strategy at the Center for American Progress. Sam Berger is the senior adviser at American Progress.